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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 117

JOSEPH M. CORTINAS,

Appellant,

vs.

MRS. JOSEPH DI GIOVANNI, WIDOW OF PHILIP FERRARA, MRS. CATHERINE FERRARA, WIFE OF ANTHONY LAMANDRE, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT AS TO JURISDICTION

JOHN R. PEREZ,
JOHN R. PEREZ, JR.,
DANIEL WENDLING,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 117

MRS. JOSEPHINE DI GIOVANNI, WIDOW OF PHILIP FERRARA, AND OTHERS,

Appellees,

vs.

JOSEPH M. CORTINAS,

Appellant

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, Joseph M. Cortinas, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal from the Supreme Court of Louisiana, respectfully represents:

A

The statutory provision which sustains the jurisdiction of the United States is Section 1257 of Title 28 of the United States Code, reading as follows:

"Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority expressed under, the United States."

B

Date of Judgment and Date of Application for Appeal

The date of the final decree of the Supreme Court of Louisiana which is now sought to be reviewed was February 13, 1950, the date on which appellant's application for rehearing was refused. (Record, page 21).

The date on which the petition for appeal to this Court was presented was April 14, 1950. The order allowing the appeal was signed that same date by the Hon. Frank W. Hawthorne, Associate Justice of the Supreme Court of Louisiana, in the absence from the Court of the Chief Justice. However, Justice Hawthorne did not designate himself as Presiding Justice, and when the record was presented to the Clerk of the Supreme Court of the United States, he refused to accept same for filing in view of Section 1 of Rule 36 of the Rules of the Supreme Court of the United States. (Record, page 68).

Appellant then filed a motion in the Supreme Court of Louisiana requesting the rescission and recalling of the aforementioned order of appeal. The order was signed on May 12, 1950, and a new order of appeal and citation was

issued by the Chief Justice of the Supreme Court of Louisiana that same date. (Record, pages 75-77).

The time for taking the appeal began to run on the date of the denial of said motion for a rehearing, to wit, February 13, 1950. *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31.

In hearing and deciding the case at bar the Supreme Court of Louisiana, the highest Court of the state to which an appeal could be had in a matter of this nature, was acting in a judicial capacity. The denial of the aforementioned application for a rehearing exhausted the remedies of appellant in the courts of his state. Consequently, the Supreme Court of the United States may review the decree rendered herein by the Supreme Court of the State of Louisiana.

C

Proceedings in the State Courts

On October 27, 1944, Appellees brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against appellant, stating that they were the *owners* of certain real estate in the City of New Orleans; that they had acquired it by inheritance from their father, Philip Ferrara, who died on June 28, 1928; that for the years 1938, 1939 and 1940 the property was assessed in the name of their deceased father; that the city taxes for those years were not paid; that after due advertisement in the City of New Orleans, the city sold the property for each delinquent tax year to the Atlantic Municipal Corporation; that on or about July 2, 1943, the Atlantic Municipal Corporation executed a quit-claim deed in favor of appellant, Joseph M. Cortinas; that appellant, about January of 1943, informed appellees that all future rents due by tenants were to be paid appellant and that tenants thereafter paid appellant; that the court should

order appellant to account to appellees for the amount of rents collected from said date; that appellees had offered to redeem the property, but that the offer was refused. Respondents prayed that the tax sales took place illegally; that they should be annulled and that inscriptions of said sales and the quitclaim to appellant be cancelled from the records of the Conveyance Office. (Record, pages 1 thru 6).

Appellant filed exceptions of no right or cause of action, and they were overruled. He then answered, denying that the property he acquired from the Atlantic Municipal Corporation was the property of the respondents, stating that Philip Ferrara acquired title from the Tulane Investment Company, Inc., in 1922, and that thereafter Jose Venta, *et als.*, brought suit against the said Philip Ferrara, and after his death his widow and children were made parties to said suit, in which Jose Venta, *et als.*, claimed ownership of the property, averring that the tax sale on which the title of Philip Ferrara was based was null and void; that the Supreme Court of Louisiana decided in said case that the widow and heirs of Philip Ferrara had no right, title or interest in and to the said property; and that appellant and his author in title, pursuant to Section 66 of Louisiana Act 170 of 1898, went into possession of the property in controversy and were entitled to the fruits and revenues thereof. (Record, pages 8 thru 11).

The lower court rendered judgment in favor of your petitioner on July 9, 1947. Said judgment was signed on the 15th day of July, 1947. That same day respondents suspensively and devolutively appealed to the Supreme Court of the State. (Record, pages 13 thru 14).

The Supreme Court reversed the judgment of the lower court on January 9, 1950, annulling the tax sales and remanding the case in order that additional evidence might be introduced by the parties concerning the amount of taxes

due appellant by appellees and the rents and revenues that might be due appellees by appellant. (This brief, Appendix A, page 18).

On January 20, 1950, petitioner applied for a rehearing in the Supreme Court. In his petition and supporting brief he specifically urged the unconstitutionality of the action of the court, alleging that its decision deprived him of his property without the due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States. Petitioner further stated that the judgment aggrieved him in that it ordered him to reimburse appellees for rents and revenues which he had collected from tenants of the property. He specifically urged, in this respect, that Louisiana Act 170 of 1898, Section 66, gave him the right to take actual possession of the property provided no force or violence was used, and that the decision of the Court was a violation of the Fourteenth Amendment. (Record, pages 17 thru 20.)

The rehearing was refused without written reason on February 13, 1950, three justices joining in the opinion that the rehearing should have been granted. (Record, page 21.)

D

Applicable Law and Jurisprudence

To the extent applicable here, the following is brought to the attention of the Court:

Article 10, Section 11 of the Constitution of 1921 of the State of Louisiana, as amended, Acts 1927, No. 4, Section 1, adopted April 17, 1928; 1932, No. 147, Section 1, adopted November 8, 1932:

". . . The sale shall be without appraisement and the property sold shall be redeemable at any time during three years from date of recordation of the tax sale . . ."

"No sale of property for taxes shall be set aside for any cause except on proof of payment of the taxes for which the property was sold prior to the date of the sale, unless the proceeding to annul is instituted within six months from service of notice of sale, which notice shall not be served until the time of redemption shall have expired and within five years from the date of the recordation of the tax deed, if no notice is given. The fact that taxes were paid on a part of the property sold, prior to the sale thereof, or that part thereof was not subject to taxation, shall not be cause for annulling the sale as to any part thereof on which the taxes for which it was sold were due and unpaid. . . . "

With regard to the right of a purchaser to assume possession of property purchased at a tax sale, Act No. 170 of 1898, Section 66, provides as follows:

"Upon presenting a certified copy of said deed to any judge of competent jurisdiction, to be determined by the value of the real estate therein contained, and not the amount of the taxes, the judge shall, in chambers, grant an order of seizure and possession, commanding the sheriff to seize said property and place the purchaser in actual possession thereof; and writ of possession shall be issued thereon by the clerk, but the purchaser may take actual possession without such order, with the consent or acquiescence of the tax debtor or otherwise; provided, no force or violence shall be used."

With regard to the last mentioned Section 66 of Act 170 of 1898, the Supreme Court in the case at bar remanded the case to the lower court in order that the rents and revenues collected by appellant could be determined, ordering appellant to refund the determined amount to appellees. This despite the fact that the record in no manner discloses or even hints at the fact that appellant used any force or violence whatsoever when he went into possession of the property. The ruling was arbitrary.

The established jurisprudence relative to the aforementioned excerpt from Article 10, Section 11, of the Louisiana Constitution is to the effect that the owner or anyone having an interest in the property may redeem within the three year prescriptive period. However, with regard to the right to sue for the annulment of the tax sale, only the *owner* of the property may bring such action.

In the case of *Jackson* v. *Mixon*, 110 La. 581, 34 So. 695, the Supreme Court of Louisiana, in its interpretation of Article 10, Section 11, held that "Syllabus): "Persons who are not the owners, of record or otherwise, of property assessed and sold for taxes, and who have thereafter acquired no title to the same, have no interest to prosecute a suit to annul the sale."

This rule has never been distinguished or set aside by the Supreme Court of Louisiana. It is a clear and concise interpretation. One must be the owner of property in order to prosecute a suit to annul a tax sale.

The Supreme Court of Louisiana has held on two occasions that the appellees herein are not the owners of the property in question. *Venta* v. *Ferrara*, 177 La. 433, 148 So. 670, and 195 La. 334, 196 So. 550. (This brief, Appendix B and C.)

E

Substantiality of Questions Involved

Appellant, through the course of the proceedings in the lower court and in the Supreme Court, never doubted the outcome of the litigation because of the long established jurisprudence. When the Court rendered its decision, appellant immediately applied for a rehearing and specifically alleged that he had relied upon the law as interpreted by the Supreme Court of Louisiana and, through such reliance, had acquired property rights; that the decision rendered

herein did not follow the established jurisprudence and thereby violated appellant's property rights, thus depriving him of his property without due process of law in violation of Section One of the 14th Amendment to the Constitution of the United States of America; and that the Court deprived appellant of his property without due process of law in deciding that he had to account to appellees for rents he had received from the date he had taken peaceable possession of the property in accordance with Section 66 of Act 170 of 1898. (Record, pages 17 thru 20.)

Appellant had not raised Federal questions prior to the filing of the above application because he had no reason to believe that his property rights would not be protected in accordance with the long established jurisprudence under which he had acquired those rights.

Appellant respectfully represents that the questions involved in his appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question unless the contention of the appellant is "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258.

The Supreme Court of the State of Louisiana gave no written reasons for its denial of the rehearing in a four to three decision. The mere fact that a state court feels that a federal right set up in said court has no basis in point of fact does not prevent the Supreme Court from going behind the finding to see whether it is without substantial support. If the rule were otherwise it would almost always be within the power of the state court to prevent a review in the Supreme Court. *Truax* v. *Corrigan*, 257 U. S. 312, 324, citing *Kansas City Southern Railway Company* v. *Albers Commission Co.*, 223 U. S. 573, 591, 593;

Cedar Rapids Gas Light Co. v. *Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611. The legal discretion vested in a lower court does not extend to a refusal by it to apply well settled principles of law to a conceded state of facts. *Union Tool Co.* v. *Wilson*, 259 U. S. 107, affirming C. C. A., *Wilson* v. *Union Tool Co.*, 265 F. 669, certiorari granted 41 S. Ct. 14, 254 U. S. 624. ". . . Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied . . . it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States . . ." *Chicago, Burlington & Quincy Railroad Co.* v. *People*, 200 U. S. 561.

F

Cases Sustaining the Jurisdiction

". . . The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legis-

lation. Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done." *Saunders* v. *Shaw*, 244 U. S. 317, rev'g 138 La. 917, 70 So. 910.

In line with the above it is to be noted that appellant herein specially asserted his Federal rights in his application for rehearing (Record, pages 17 thru 20), and in his assignment of errors attached to his petition for appeal to this Court (Record, pages 65 thru 66).

Fact that state court rested its decision exclusively on non-federal grounds did not prevent review where such grounds were plainly untenable and the decision in substance and effect denied a specially set up and claimed federal right. Ward v. Board of County Commissioners, 253 U. S. 17, rev'g 68 Oklahoma 287, 173 Pac. 1050.

"As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier decisions will be injuriously affected. . . ." *Joseph M. Douglass* v. *Pike County, Mo.*, 11 Otto, 677, 688, 25 L. Ed. 968, 101 U. S. 677.

"It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning; but it is not true that the court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of

the Federal Constitution. . . ." *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494, 47 S. Ct. 179.

"Legal discretion vested in a lower court does not extend to a refusal by it to apply well settled principles of law to a conceded state of facts. Union Tool Co. v. Wilson, 259 U. S. 107, Certiorari granted, 254 U. S. 624.

"In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. K. C. S. Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591, 593; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668, 669; Sou. Pac. Co. v. Schuyler, 227 U. S. 601, 611." *Truax* v. *Corrigan*, 257 U. S. 312, 324.

"Stability is especially requisite in the law in regard to titles to real property. Titles may be dependent largely or wholly upon previous decisions, and landed interests would be jeopardized by sudden or frequent changes in the interpretation or construction of legal principles. By reason of this the courts are always reluctant to overrule or reverse a decision when title to real property will be involved. Therefore, when a court of last resort has announced principles affecting the acquisition of title to real property, and the principles thus announced have become established and have been frequently recognized and conformed to, and property rights have been acquired thereunder, it has generally been held that the decisions should not be overturned save by the interposition of the legislative power,

even though the principles announced therein might otherwise be questioned." 15 *C. J.* 949, Sec. 342.

"A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded so as to affect the obligations of existing contracts made on the faith of the earlier adjudications. 'The sound and true rule is,' says Taney, C. J. (in Ohio Life Insurance & Trust Co. v. Debolt, 16 How. 416, 431, 14 L. ed. 997, 1004), 'that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its courts altering the construction of the law.' ". Sutherland, Statutory Construction (2d Ed.) Vol. 2, Sec. 485, p. 906.

The Supreme Court will examine for itself the record for the purpose of determining whether a federal question was necessarily involved. *Titus* v. *Wallick*, 306 U. S. 282, 59 S. Ct. 557, 83 L. ed. 653; and where there is uncertainty it may vacate the judgment and remand the cause to the state court so that "the federal question may be dissected out or the state and federal questions clearly separated." *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 60 S. Ct. 676, 84 L. ed. 920.

"That decision (referring to a decision previously discussed in the case cited below) established a rule of property, over 18 years ago; and it is only fair to assume that investors who have bought or taken mortgages upon manufacturing or industrial establishments in this state, includ-

ing the bondholders represented by the trustee in this case, acted upon the faith of the construction which this Court put upon the Act 30 and the Act 187 of 1904, in the decision quoted. If we doubted the correctness of that construction now, we would not change it, so as to impair the obligation of contracts presumed to have been made on the faith of it. Southern Grocer Co. v. Adams, 112 La. 60, 36 So. 226; Maxwell-Yerger Co. v. Rogan, 125 La. 1, 51 So. 48. The Supreme Court of the United States treats the construction which the highest court of a state has given to a statute of the state as a part of the statute itself; and if different constructions are given to the same statute at different times, it will not follow the latest decision if thereby contract rights which have arisen under the earlier ruling would be injuriously affected. Douglass v. Pike County, 101 U. S. (11 Otto) 677, 25 L. Ed. 968." *Straus* v. *City of New Orleans*, 166 La. 1046.

". . . Respect for continuity in law, where reasons for change are wanting, alone requires adherence to . . . the other decisions. Especially ought the Court not to reenforce the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." Mr. Justice Frankfurter, concluding his forceful dissenting opinion in *United States* v. *Rabinowitz*, No. 293, October Term, 1949.

Timeliness of appeal. *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31.

G

Conclusion

Appellant avers that the opinion of the State Court is founded on a faulty and irreconcilable interpretation of

a clear, express law of the state and the long established jurisprudence clearly and concisely interpreting said law. The decision violates a rule of property, and many of those property owners whose title emanates under the law and jurisprudence applicable to this controversy will be faced with serious losses because of the cloud this decision casts upon the merchantability of such titles.

Appellant avers that the Supreme Court of Louisiana has acted in violation of express law and settled jurisprudence, and that those whose rights are affected by such arbitrary action should be granted the right and opportunity to invoke the protection guaranteed them under Section One of the Fourteenth Amendment of the Constitution of the United States.

Therefore the appellant, Joseph M. Cortinas, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 1257 of Title 28 of the United States Code.

Respectfully submitted,

(S.) JOHN R. PEREZ,
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(S.) DANIEL WENDLING,
Counsel for Appellant.

APPENDIX "A"

SUPREME COURT OF LOUISIANA

No. 38,713

MRS. JOSEPHINE DI GIOVANNI, Widow of Philip Ferrara and Others

v.

JOSEPH M. CORTINAS

On Appeal from the Civil District Court, Parish of Orleans, Division "E." Honorable Frank J. Stich, Judge

PONDER, *J.:*

The plaintiffs brought suit against the defendant seeking to redeem property sold at three tax sales and, in the alternative, to annul the tax deeds. The plaintiffs asked for the return of rents alleged to have been wrongfully collected from their tenants by the defendant. The defendant's answer is in the nature of a general denial and a denial of any prior ownership of the property in the plaintiffs' predecessor in title. On trial of the case, the lower court rejected the plaintiffs' demands and dismissed their suit. They have appealed.

Philip Ferrara acquired two lots of ground in the City of New Orleans from the Tulane Investment Company, Inc. by deed dated October 13, 1902 described as being situated in the third district in square 1501, bounded by St. Anthony, Hope, Law and Bourbon Streets. Philip Ferrara died on June 28, 1928 leaving a widow and four children, the plaintiffs herein. His succession was opened in the Civil District Court for the Parish of Orleans and a judgment was rendered sending the plaintiffs into possession on June 1, 1931, wherein his widow was decreed the owner of an undivided one-half interest in the property as surviving spouse in community and as usufructuary of the other undivided one-half interest. The children were recognized as the heirs

of the decedent and decreed the owners of a one-half interest in the property subject to the usufruct. This judgment was recorded in the Conveyance Office on June 2, 1931. The assessment of the property was continued in the name of Philip Ferrara and it was assessed in his name during the years 1938, 1939 and 1940 under the following description, Lots 9 and 10, Square —, Seventh Ward, Third Municipal District, measuring 106 by 128 feet. The property was sold by the City of New Orleans to the Atlantic Municipal Corporation under the name of Philip Ferrara for unpaid taxes for the year 1938 and a deed was executed to the corporation on November 3, 1939 wherein the property was described as lots 9 and 10, bounded by St. Anthony, Hope, Law and Bourbon Streets. This deed was recorded in the conveyance records on November 4, 1939. The property was sold again by the City of New Orleans in 1940 to this same corporation under the name of Philip Ferrara for the unpaid taxes of 1939, deed dated October 22, 1940 and recorded in the conveyance records on October 23, 1940. The property was again sold to this corporation by the city under the name of Philip Ferrara in 1941 for the unpaid taxes of 1940, deed dated October 23, 1941 and recorded in the conveyance records on October 24, 1941. The plaintiffs continued in possession of the property after the death of Philip Ferrara. We find in the record two letters written by a representative of the Atlantic Municipal Corporation during the month of January 1943 wherein the corporation informed Mrs. Philip Ferrara of the amount required to redeem the property and stated that if she did not make settlement within a short time that this representative of the corporation would call on her tenant and notify him to pay the rent to the corporation. On February 13, 1943 the corporation executed a quit claim deed to the defendant Joseph M. Cortinas conveying this and other property without warranty. The plaintiffs' tenants have refused to pay them the rent since that date and have been paying it to the defendant. The present suit was filed October 27, 1944.

The plaintiffs' right to redeem the property has expired under the provisions of Article 10, Section 11 of the Con-

stitution of 1921, as amended, wherein it is provided that property sold for the payment of delinquent taxes "shall be redeemable at any time during three years from date of recordation of tax sale." The plaintiffs contend that there is an exception to the literal application of this provision of the constitution that interrupts the running of the redemptive period, viz: the continued possession of the property by the owner after the tax sale. They cite Pill v. Morgan, 186 La. 329, 172 So. 409 and many other decisions of this Court to support their contentions. All of the authorities cited as well as the recent decision in the case of Westover Realty Company v. State, 208 La. 163, 23 S. (2d) 33 are to the effect that the peremption established for tax sales by the Constitution requiring actions to set aside such sales to be brought within three years, now five years, from the date of the recordation of the tax deeds does not accrue when the owner remains in corporeal possession of the property. These decisions relate solely to actions to annul or set aside tax sales and not to the period of time in which property may be redeemed. The defendant contends that the plaintiffs are without interest to attack the tax deeds because it was held in the cases of Venta v. Ferrara, 177 La. 433, 148 So. 670 and Venta v. Ferrara, 195 La. 334, 196 So. 550 that the plaintiffs did not own the property. He takes the position that a mere possessor cannot bring an action of nullity. It is true that it was held in the Venta cases that the plaintiffs did not own the property but the latter case was remanded in order that the Ventas might elect whether they would keep the improvements placed thereon by the plaintiffs and reimburse the value thereof or reimburse the sum equal to the enhanced value of the soil. The plaintiffs' calls in warranty were reinstated and the taxes paid by them were to be reimbursed by the Ventas. It does not appear that the Ventas have taken any steps to comply with the judgment or made any effort to obtain possession of the property. The plaintiffs clearly have an interest in the property and have continued to remain in possession of it.

The defendant contends that neither the Ventas or the Ferraras ever acquired lot ten. We find in the record a

quit claim deed from one Queyrouze to the defendant purporting to transfer lot 10 to the defendant, but there was no issue made in the pleadings that the defendant was relying on a title emanating from another source and there is no chain of title to support the quit claim. We are in no position to state, after review of this record, who is the actual owner of lot 10. But be that as it may, the defendant is in no position to question the right of the plaintiffs to attack these tax deeds, made in the name of the plaintiffs' husband and father, when the defendant is relying on them to establish his ownership to whatever property they might convey. The plaintiffs have a right to annul the tax sales if their right of action is not perempted.

Under the provisions of Article 10, Section 11 of the Constitution of 1921, as amended, the plaintiffs have a right to attack these deeds any time within the five year period and it is well established that the peremption of five years does not accrue while the tax debtor is in the corporeal possession of the property. This court has so held in many decisions. We will refer to some of these decisions. See Pill v. Morgan, supra, and the decisions cited therein to the effect that this peremption does not apply when the owner remains in corporeal possession of the property. In Westover Realty Company v. State, supra, it was pointed out that owners continuing in possession of the property, notwithstanding the tax sale, operates as a continuous protest against the sale.

This property was sold in the name of a dead person. Ferrara died in 1928 and the first tax sale was made in 1939, some eleven years after his death. His widow and heirs were put in possession of the property and the judgment was recorded in the conveyance records in 1931. It was pointed out in the case of Nylka Land Company v. City of New Orleans, 166 La. 786, 117 So. 918 that "it is well settled that a tax sale made under an assessment in the name of one who is not the owner of the property, either in fact or according to the public records, is not a valid sale, unless and until the illegality is cured by the prescription of three years." The peremptory period now has been extended to five years. In the case of Federico v. Nunez, 173 La. 957,

139 So. 18 where property was sold in the name of a dead person, it was pointed out that the word "delinquent" as used in the constitution requiring notice to be given to the delinquent before sale of property for taxes means the owner at the time of issuing the notice. It was further pointed out therein that a notice addressed to a dead person was no notice at all. From a reading of that case it is apparent that a tax sale of property in the name of a dead person without giving notice to the actual owners is null and that it is the duty of the tax collector to consult the records to ascertain who is the actual owner of the property and serve notice on them. This was not done in the present case.

In the case of Martin v. Serice, 200 La. 556, 8 So. (2d) 538, this court again stated that the notice of tax delinquency must be served on the owner of record at the time of the advertisement and sale of the property. The notices in this case were addressed to Philip Ferrara and not addressed to the record owners. The names of the record owners could have been easily ascertained by an examination of the conveyance records. The return on the notices show that one was delivered to Mrs. P. Ferrara, another does not show whom it was served on, and the other purports to have been served on Philip Ferrara. The plaintiffs were not given the notice of the tax sale that the law contemplates and they have not abandoned or been legally divested of their possession of the property.

The evidence as to the amount of taxes paid by the defendant and the amount of rents due the plaintiffs is not sufficient for us to accurately determine what is due to either of them. In the interest of justice the case will be remanded in order that the parties litigant may have an opportunity to introduce additional evidence to establish their claims in this respect.

For the reasons assigned, the judgment of the district court is annulled and set aside. The case is remanded to the district court in order that additional evidence may be introduced by the parties to the suit concerning the amount of taxes due the defendant by the plaintiffs and the rents

and revenues that may be due the plaintiffs from the defendant, and, upon determination of such amounts by the district court, that a proper judgment be rendered regarding these claims. It is further ordered that the three tax deeds of dates November 3, 1939, October 22, 1940 and October 23, 1941, purporting to convey the property to the Atlantic Municipal Corporation, are annulled and the quit claim from the Atlantic Municipal Corporation to Joseph M. Cortinas of date February 13, 1943 is annulled insofar as it purports to transfer the property acquired at these tax sales upon the plaintiffs reimbursing the defendant or depositing in the registry of the court the amount of taxes and costs paid by the defendant with 10% per annum interest on the amount of the price and taxes paid from date of respective payments in compliance with Article 10, Section 11 of the Constitution of 1921, as amended. All cost to be paid by the defendant.

No. 38,713

MRS. JOSEPHINE DI GIOVANNI, Widow of Philip Ferrara and Others

vs.

JOSEPH M. CORTINAS

McCALEB, *J.*, Dissenting in Part:

I am in accord with the ruling that plaintiffs have lost any right that they might have had to redeem the property as more than three years have elapsed since the recordation of the tax sales. But this ruling should end the case as counsel for plaintiffs stated to this court during oral argument that he was not pressing the alternative claim for nullity of the tax sales.

However, apart from counsel's abandonment of the alternative contention, it seems plain to me that the claim is wholly without merit as it has not been made within the five year period of peremption provided by Section 11 of Article 10 of the Constitution. The argument that the

peremption has not accrued because plaintiffs were in corporeal possession of the property is not well founded for the reason that peremption can only be suspended in cases where the owner of the property has remained in actual corporeal possession. See Baldwin Lbr. Co. vs. Dalferes, 138 La. 507, 70 So. 493; Kivlen vs. Horvath, 163 La. 901, 113 So. 140 and Westover Realty Co. vs. State, 208 La. 163, 23 So. (2d) 33.

That plaintiffs are not the owners of the property has already been twice decided by this court in Venta vs. Ferrara, 177 La. 433, 148 So. 670 and 195 La. 334, 196 So. 550. In view of these adjudications, I am at a loss to understand the conclusion of the majority forasmuch as, whatever be the nature of plaintiffs' possession, they are without standing in court to attack the tax sale where they are without title to the property. In Jackson vs. Mixon, 110 La. 581, 34 So. 695, the syllabus of the court states:

> "Persons who are not the owners, of record or otherwise, of property assessed and sold for taxes, and who have thereafter acquired no title to the same, have no interest or standing to prosecute a suit to annul the sale."

I think that the judgment of the district court should be affirmed.

APPENDIX "B"

SUPREME COURT OF LOUISIANA

No. 35186

VENTA et al.

v.

FERRARA

April 29, 1940

Rehearing Denied May 27, 1940

ODOM, *Justice:*

This case was before us in May, 1933. See Venta et al. v. Ferrara, 177 La. 433, 148 So. 670.

As stated in that opinion, the suit is a petitory action brought by plaintiffs to recover certain lots of ground situated in the City of New Orleans. Plaintiffs alleged that they owned the property, and set out their chain of title. They alleged that Philip Ferrara claimed to own the property and was then in physical possession of it without title.

Ferrara in his answer denied that plaintiffs owned the lots, admitted that he was in possession of them, and alleged that he had acquired the property in good faith and for a valuable consideration from the Tulane Investment Company, Inc., by deed, notarial in form, on October 30, 1922, and that his deed was then recorded in the conveyance records. He further alleged that he purchased the property under full warranty of title and that, at the time the Tulane Investment Company, Inc., sold the lots to him, that company was in possession of them "with warranty of title."

Ferrara, the defendant, further alleged that, following his purchase of the lots, he took possession of them and in good faith erected two frame buildings on the lots and made other improvements to them, all at a total cost to him of $8,475, and that he had paid taxes on the property amounting to approximately $600. He prayed that plain-

tiff's demands be rejected, and that, in case it should be decreed that they were the owners of the lots, he should have judgment against them for the amount of the taxes paid and the value of the improvements which he had made. He called his vendor, the Tulane Investment Company, Inc., in warranty. In its answer to the call in warranty, the Tulane Investment Company, Inc., denied that plaintiffs were the owners of the property and alleged that it had purchased the lots under full warranty of title from Josiah Gross on September 11, 1922, under deed then of record. It in turn called Gross in warranty. Gross died in the meantime, and his widow and heirs answered the call in warranty. They alleged that Josiah Gross had purchased the lots at tax sale on October 9, 1918, the sale having been made by the tax collector for the unpaid taxes for the year 1917 due by Venta et als., the plaintiffs in this suit. They further alleged that Josiah Gross acquired valid title to the land.

Ferrara died while the suit was pending, and his widow and heirs were substituted as parties defendant. There was judgment in the lower court in favor of defendants, the heirs of Ferrara, decreeing them to be the owners of the property and recalling the calls in warranty.

Plaintiff appealed to this court. We reversed the judgment of the lower court as to the title and reinstated the calls in warranty, our decree reading in part (177 La. 433, 148 So. 672): "the plaintiffs are decreed to be the owners of the property sued for, and the calls in warranty are reinstated to be adjudged when it is determined in the lower court whether or not and to what extent, if any, the defendant may recover for the value to the property of the improvements placed thereon by him and the sum of the taxes assessed against the property and paid by him during his possession and occupancy thereof."

There was involved in the suit not only the issue as to whether plaintiffs or defendants owned the property, but also the question as to whether the defendants, in case of eviction, were entitled to recover the amount of taxes which they had paid and the value of the improvements. We decided the issue as to the title but did not pass upon the other

issues involved. The reason for our failure to pass upon this question was that the testimony in the record relating to this point was not sufficient to support a decree, and the case was remanded.

At the second hearing of the case in the district court, very little testimony was introduced. At the opening of the trial on the remand, counsel for plaintiffs informed the court that his clients elected "to demand the demolition of the works, plantations and edifices that may have been erected by the Defendant" on the property, and that they reserved the right "to apply for rents, for occupancy of the property in question from the date of judicial demand," etc. Counsel for plaintiffs then called one witness, who testified that such buildings as defendant had erected upon the property had added nothing whatever to its value. Plaintiffs closed their case.

Counsel for defendants called Mr. Reimann as a witness. He stated that he was a contractor, that he had examined the buildings erected on the property by defendants, and that in his opinion they were now worth approximately $7,500, less depreciation of 25 per cent. He testified that he had examined the buildings carefully only a few days prior to the date on which he was called to testify. The other witness called by defendant was not questioned as to the improvements.

There was judgment in favor of the plaintiffs and against the defendants, dismissing defendants' demand for the value of improvements "but granting unto defendants the right to remove improvements placed upon said property within a reasonable time." There was also judgment in favor of defendants and against the plaintiffs for taxes paid, amounting to $143.76. From the judgment rendered, defendants appealed.

(1, 2) The question whether defendants were possessors of the property in good faith is necessarily involved in the suit and must be decided. If defendants were possessors in bad faith, their only right is to remove their materials in case the plaintiffs elect not to keep the improvements. On the other hand, if they were possessors in good faith, plaintiffs have no right to demand the demolition of the buildings, but

have their choice "either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil." Fourth paragraph, Article 508, Revised Civil Code; Voiers v. Atkins Bros., 113 La. 303, 36 So. 974 (see opinion on rehearing beginning on page 333, of 113 La., on page 985 of 36 So.); Ruth v. Buwe, 185 La. 204, 168 So. 776.

The trial judge in his written opinion did not state in so many words that he thought the defendants were possessors in bad faith. But he evidently thought so, because he granted to them only such right as the law accords to possessors in bad faith, which is to remove such works as they may have erected on the property and which the plaintiffs do not elect to keep. The judgment granted to the defendants "the right to remove improvements placed upon said property within a reasonable time."

The trial judge in his written opinion stated that from an examination of the record "it is self evident that Gross did not acquire title to the property by virtue of his tax deed, and, that being so, how then could the defendant be such a holder of the property as would warrant him, in law, in recovering any sum whatsoever for the improvements placed upon the property? The very factor which would cause to exist the right to recover for such improvements is absent here."

(3) The ruling of the judge is erroneous. As relates to the question of good faith, it is not material to inquire whether Gross acquired title at the tax sale. The material question is whether Philip Ferrara purchased the property in good faith from the Tulane Investment Company, Inc., believing that company had good title, and whether he took and held possession in good faith under the title which he acquired.

The defendants were unquestionably possessors in good faith. Philip Ferrara purchased the property from the Tulane Investment Company, Inc., on October 30, 1922—four years after Gross acquired it at tax sale—, for a cash consideration of $1,250, the deed reciting that the property was sold and delivered "with all legal warranties and with full subrogation in and to all the rights and actions in war-

ranty which said vendor has or may have against all preceding owners and vendors." The deed is in the usual form, containing all the stipulations ordinarily found in cash deeds with full warranty. The instrument is "sufficient in terms to transfer property."

The testimony shows that, soon after Philip Ferrara purchased the property and recorded his deed in the conveyance records, he took possession of the lots, which were then without improvements of any character or description. He filled in the lots with earth at a cost to him of $300. He then erected on the property two frame buildings, one of which cost $3,500 and the other $4,500. He built sidewalks at an expense of $175. As soon as one of the buildings was completed, he moved into it with his family and occupied it as a residence until the date of his death, and thereafter his widow and children continued to occupy it as a residence for a number of years. There is nothing to show—in fact there is not the slightest indication—that he acted otherwise than in perfect good faith. In fact, all the circumstances show that he was in good faith. He paid $1,250 cash for the property and thereafter improved it at an expense exceeding $8,000 and paid the taxes regularly. He possessed and occupied the property as owner, and there is nothing in the record to show that any defects in the title were ever pointed out or made known to him. Clearly the first intimation that he had that these plaintiffs were claiming title to the property was when they filed suit against him in 1927, five years after his purchase of the property. All of the improvements were made on the property prior to the date on which the suit was filed.

There are two articles of the Revised Civil Code specifically relating to the question as to who are possessors in good faith, Articles 503 and 3451. These articles read as following:

"Art. 503. Bona Fide Possessor. He is bona fide possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of. He ceases to be a bona fide possessor from the moment these defects are made known to him, or are

declared to him by a suit instituted for the recovery of the thing by the owner."

"Art. 3451. Possessor in Good Faith. The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another."

Philip Ferrara purchased this property from the Tulane Investment Company, Inc., under an act sufficient in terms to transfer property and from the date of his purchase possessed the property as owner by virtue of that act. He was ignorant of any defects in the title, and the defects found to exist by this court were not made known to him and were not declared to him by suit instituted for the recovery of the property until after he had spent a sum exceeding $8,000 in improving the property. He had just reason to "believe himself the master of the thing" which he possessed. When he bought the property, he had reason to suppose that it belonged to the one who sold it to him. He did not cease to be a possessor in good faith until the present suit was filed, which, as we have stated, was after he had improved the property.

Article 3452 of the Revised Civil Code says that "The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective." Philip Ferrara did not assume the quality as master of the property when he well knew that he had no title to the thing. On the contrary, he took the property under conditions described in Articles 503 and 3451 of the Code.

According to Article 503 of the Code, one ceases to be a bona fide possessor from the moment that the defects in his title "are declared to him by a suit instituted for the recovery of the thing by the owner." Therefore, Philip Ferrara ceased to be a possessor in good faith on the date service of this suit was made. And counsel for plaintiffs argue that, because Ferrara defended the suit, claiming that he owned the property, and because the property was finally

decreed to belong to plaintiffs, his status as a possessor in bad faith was fixed as of the date on which he originally acquired the property, and they cite in support of their argument Nabors Oil & Gas Co. v. Louisiana Oil Refining Co., 151 La. 361, 91 So. 765. In that case the court, after quoting Article 503 of the Code, stated that the law, as laid down therein, presupposed the existence of defects in the title or the bringing of a suit by the owner, and that the responsibility of determining whether defects existed was thrown upon the possessor "from the moment that he is informed that his title is defective, or that a suit is brought by one asserting ownership" (151 La., at page 384, 91 So. at page 773). The court then stated: "and if, then, acting upon his own judgment, or upon the advice of others, he refuses to surrender the property, and it is wrested from him at end of a lawsuit, his status as a possessor in bad faith becomes established, and, where immovable property is involved, his liability is determined in accordance with the following provisions of the Civil Code, to wit."

The interpretation which counsel have placed upon this expression found in the opinion of the court is erroneous. What the court held was that, when a suit is brought by one asserting ownership against the one in possession and when the possessor refuses to surrender the property and it is wrested from him at the end of the lawsuit, the defendant's status as a bad-faith possessor is established as of the date of the institution of the suit, and thereafter he is a possessor in bad faith. If the court intended to hold as counsel for plaintiffs contend that it did, such holding would be in direct conflict with the very article of the Code which the court had just quoted, which provides that one ceases to be a bona fide possessor from the moment the defects in his title are made known to him "or are declared to him by a suit instituted for the recovery of the thing by the owner."

(4) One may possess property in perfect good faith for a number of years, even though there are, as a matter of law, defects in his title, and, when he does, he ceases to be a possessor in good faith only from the moment these defects are made known to him or a suit is filed against him

for the recovery of the property. That is what the Code says.

The defendants being possessors in good faith, plaintiffs have no right to demand the demolition of the houses built upon the property by defendants, but plaintiffs have their choice "either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil" (Fourth paragraph, Article 508, Revised Civil Code).

(5) We find it necessary to remand this case again to the district court in order that plaintiffs may elect whether they will keep the useful improvements and reimburse the value thereof, or reimburse a sum equal to the enhanced value of the soil. If the plaintiffs elect to keep the useful improvements placed upon the property by defendants, the burden will be upon defendants to establish their claim for improvements, according to the rules laid down by the Code. If the plaintiffs elect to pay the enhanced value of the soil, they must show by evidence what the enhanced value is. Foster v. Meyers, 117 La. 216, 41 So. 551, and Hutchinson v. Jamison, 38 La. Ann. 150. The calls in warranty should be reinstated. There should be an adjustment of the amount of taxes which defendants are entitled to recover.

For the reasons assigned, the judgment of the district court is set aside; the defendants are decreed to be possessors in good faith, the calls in warranty are reinstated, and it is ordered that the case be remanded to the district court in order that there may be an adjudication as to the calls in warranty, and ordered that the case be proceeded with otherwise in accordance with the views herein expressed; costs of this appeal to be paid by plaintiffs, all other costs to await the final decree.

O'Niell, C. J., does not take part.

APPENDIX "C"

SUPREME COURT OF LOUISIANA

No. 31480

VENTA et al.

v.

FERRARA

May 1, 1933

Rehearing Denied May 29, 1933

BRUNOT, *Justice:*

This is a petitory action brought by the seven forced heirs of Jose Venta, Sr., deceased, five of whom reside in the city of New Orleans; one is a resident of Cook county, Ill., and one resides in Mexico City, Mexico. The suit is for the recovery of the following property:

> "Four certain lots of ground with all the buildings and improvements thereon, etc., situated in the Third District of this City in Square bounded by Hope, St. Anthony, Law and Bagatelle streets, designated by the numbers Nine and Twelve on a plan drawn by Joseph Pilie, city surveyor, June 1st, 1830, and deposited in the office of C. Pollock formerly a Notary Public in this city, by act dated 18th of June, 1830, which said lots of ground measure as follows: Two of said lots forming together lot Nine and forming the corner of Hope and St. Anthony streets measures each 31′ 11″ and 4‴ front on St. Anthony street by 127′ 10″ 5‴ in depth, and the other two lots forming together lot number Twelve, measure each 31′ 11″ 4‴ front on St. Anthony, by 127′ 10″ and 5‴ in depth: said square of ground is designated as square number 112 on the plan above mentioned, the whole as per plan made by Charles G. Del Isle, architect, dated 1st of October, 1884. Excepting therefrom, a certain portion of ground

and improvements thereon in the Third District of New Orleans in Square bounded by Bourbon, St. Anthony, Law and Hope streets designated as portions in square number 1501; said portion measures 3′ front on St. Anthony street, by a depth of 127′ 10″ and forms the corner of Hope Street, and the other portion measures three feet front on St. Anthony street by a depth of 127′ 10″ which lastly designated portions of property was sold from that firstly described at tax sale by the State of Louisiana, to Josiah Gross on October 9th, 1918, by authentic act passed before John P. Sullivan, Notary Public of this city, registered in the Office of the Register of Conveyances in Book 305, folio 166."

It may be noted here that Bourbon street was formerly Bagatelle street.

The defendant excepted to the petition upon the grounds of vagueness, inconsistent allegations, and no right and no cause of action. The exceptions were referred to the merits, the defendant answered the suit, reconvened for the value of certain improvements he alleges he placed upon the property, and he called the Tulane Investment Company, Inc., his vendor, in warranty. The answer of this defendant in warranty is an attack upon the demands of the plaintiffs. It is based upon pleas of res adjudicata and the constitutional prescription of three years as bars to their recovery.

Following these proceedings, the defendant died, and his surviving widow and heirs were properly substituted as the defendants in the suit. In a supplemental answer filed by the widow of Philip Ferrara, deceased, for herself individually, and in her capacities as executrix of the estate of the deceased and as the tutrix of their minor children, she called the widow and heirs of Josiah Gross, the vendor of the Tulane Investment Company, Inc., in warranty. The answer of these defendants in warranty is identically the same as that previously filed by the Tulane Investment Company, Inc.

The case was tried on the issues stated, and judgment was rendered thereon in favor of the defendants and against

the plaintiffs, rejecting the plaintiffs' demands at their cost and dismissing the calls in warranty. From this judgment the plaintiffs appealed.

(1) The record discloses that on April 14, 1886, Jose Venta, Sr., acquired, at public auction, all of the property described in the petition, including the two small portions thereof which the plaintiffs have excepted from their demand. At a time not disclosed by the record, but prior to June, 1909, Jose Venta, Sr., died. His succession was opened and administered by his son, Jose Venta, Jr., and on June 29, 1909, the administrator was discharged from his trust, and his bond, as administrator, was canceled by a formal judgment of the court. The property of which Jose Venta, Sr., died possessed was carried on the assessment rolls in his name for eleven years after his succession had been opened, administered, and closed. It was described and valued on the assessment roll for the year 1918 as follows:

"65—Jose Venta St. Anth and Hope 63—127 }
Jose Venta St. Anth and Hope 63—127 } 400."

The figures "63—127" represent the foot measurements of the frontage and depth of each lot, and the figures "400" represent the assessed value of both lots. The taxes on this property for 1918 became delinquent and the tax collector advertised for sale and sold only two small portions of it for the taxes due on the whole property. All that Josiah Gross acquired at the tax sale on October 9, 1918, is the property which was advertised and sold. Both in the advertisement and in the tax deed to Gross the property is described as follows: "A certain portion of ground and improvements thereon in the Third District of the City of New Orleans, in square bounded by Bourbon, St. Anthony, Law and Hope streets, designated as Portions in square No. 1501; said one portion measures 3 feet front on St. Anthony street by a depth of 127 feet and 10 inches and forms the corner of Hope street and the other portion measures 3 feet front on St. Anthony street by a depth of 127 feet 10 inches."

This deed is not attacked, but it is relied upon by the defendant, and by the defendants in warranty herein. Civ.

Code, art 2236, is as follows: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery."

It is clear that Gross did not acquire title, by his tax deed, to any of the property claimed by the plaintiffs in this suit. Therefore the three years' prescription pleaded by the defendants in warranty herein is without a basis to rest upon.

(2, 3) On May 12, 1921, Josiah Gross, claiming to be the owner of the entire property by virtue of his tax deed passed before John P. Sullivan, notary, on October 9, 1918, filed suit against Jose Venta, Jr., for a writ of seizure and possession of the whole property. He alleged in his petition that Jose Venta, Jr., was in the actual possession of the property under color of tenancy from his coheirs. He prayed for citation of the heirs of Jose Venta, Sr., deceased, naming them, and for judgment commanding the civil sheriff of the parish of Orleans to seize said property and to place him in the actual possession thereof. Jose Venta, Jr., was the only person served in this proceeding. The sheriff's return is as follows:

"On the 23rd day of May, 1921, served a copy of the within Notice of Seizure on Joseph Venta defendant herein in person. Sheriffs fees 50c. Returned same day.

"(Signed) JAMES F. DUPLESSES,
"*Deputy Sheriff, Orleans Parish.*"

In the transcript of the record in this matter it does not appear that Jose Venta, Jr., or any one of his coheirs made an appearance in the proceeding, nor does it appear that any evidence whatever was introduced. The only thing before the court was the plaintiff's petition with a certified copy of his tax deed annexed to and made part thereof, and we have seen supra that Josiah Gross did not acquire title to any part of the property claimed by these plaintiffs by virtue of that tax deed. That a deed attached to and made part of a petition is controlling is a principle of law too well recognized to require the citation of authorities. It is the issuance of the writ of seizure and possession on the

petition and attached deed as stated that is pleaded in the answers of the defendants in warranty in this suit as res adjudicata, and, as such, a bar to the successful assertion of the claims of the plaintiffs herein. It is our opinion that the plea is without merit, for nothing pertaining to the title to the property involved in this suit has been adjudged as between the plaintiffs and the defendants or as between the plaintiffs and the defendants' authors in title.

For the foregoing reasons, the judgment appealed from is avoided and reversed; the plaintiffs are decreed to be the owners of the property sued for, and the calls in warranty are reinstated to be adjudged when it is determined in the lower court whether or not and to what extent, if any, the defendant may recover for the value to the property of the improvements placed thereon by him and the sum of the taxes assessed against the property and paid by him during his possession and occupancy thereof.

These issues present questions of fact which are not satisfactorily established by the testimony in the transcript. The case is therefore remanded to the civil district court for their determination and adjudication according to law. The costs of this appeal to be paid by the appellees, the defendant and warrantors, in equal proportions.